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No. 00-447

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF PROFESSOR KENNETH N. KLEE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The undersigned amicus curiae is Acting Professor of Law at the University of California at Los Angeles School of Law and is active in the study and teaching of bankruptcy law.[1] The undersigned respectfully submits this brief in support of the petition, dated September 21, 2000, of NextWave Personal Communications Inc., NextWave Partners Inc., NextWave Power Partners Inc., Next Wave Wireless Inc. and Next Wave Telecom Inc. (collectively, "NextWave") for a writ of certiorari to review the judgment of United States Court of Appeals for the Second Circuit (the "Second Circuit"), dated May 25, 2000, granting an extraordinary writ of mandamus against the United States Bankruptcy Court for the Southern District of New York (Hon. Adlai S. Hardin, Jr., U.S.B.J.) (the "Bankruptcy Court") filed by the Federal Communications Commission (the "FCC"). The undersigned has received the written consent of counsel of record to the parties to the submission of this amicus curiae brief. Copies of the letters granting such consent have been lodged with this Court.

The undersigned respectfully submits that the Second Circuit's decision granting the FCC's petition is wholly inconsistent with governing statutory law and the case law of this and other Courts, and as a result, has rendered the jurisdictional provisions of the Judicial Code, 28 U.S.C. § 1334(b) and (e), and the most fundamental provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), meaningless.

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[1] As required by Rule 37.6, I have authored this brief in its entirety and no party has made a monetary contribution for its preparation or submission.

II. SUMMARY OF ARGUMENT

By finding that the Bankruptcy Court did not have jurisdiction to enter the various orders with respect to the wireless PCS spectrum licenses (the "Licenses") purchased by NextWave, the Second Circuit disregarded the application of the Bankruptcy Code and the specific jurisdictional grants under federal statutory law in their entirety. Absent a Congressional mandate, the regulations promulgated under the Federal Communications Act (the "FCA") do not trump the basic statutory protections contained in the Bankruptcy Code. If the Second Circuit's decision stands, any federal agency, such as the FCC, could entirely avoid application of federal bankruptcy law notwithstanding its status as a creditor. This result would deprive debtors and their other creditors of the most fundamental and important protection of the Bankruptcy Code, the automatic stay. Such a result would undermine the role of Congress and the Bankruptcy Code itself, effectively overturning Congress's scheme with respect to the administration of a debtor's bankruptcy estate.

The Constitution grants Congress the power to establish: "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. With the Bankruptcy Act of 1898, Congress began the modern development of the rights and obligations of parties in bankruptcy cases and proceedings. In that process Congress continually weighed a variety of competing public and private interests which are clearly reflected in the fabric of the current Bankruptcy Code. In those limited instances in which Congress intended to elevate specific policy interests above the fundamental policies of a "fresh start" for debtors and equality of distribution among creditors, it did so explicitly.

The automatic stay provision under section 362(a) of the Bankruptcy Code is the most fundamental protection afforded under federal bankruptcy law to a debtor in possession, and its rights in property. Subject to certain exceptions, Congress squarely determined that, upon filing for protection under the Bankruptcy Code, all debtors should benefit from an automatic stay of all collection efforts on prepetition debts. Moreover, Congress has repeatedly stated that the narrow exceptions provided should be limited to certain specifically enumerated instances in which particular interests must prevail over the rights of a debtor.

For example, under the exception set forth in section 362(b)(4), the government may take certain actions, notwithstanding the automatic stay, under its "police and regulatory" authority, but only as are necessary to preserve or promote public health or safety. Nothing in that provision or in the FCA remotely suggests that the FCC may retroactively enforce its own pecuniary regulations to terminate the Licenses in violation of the automatic stay.

By finding that the Bankruptcy Court cannot apply the most fundamental bankruptcy protections to holders of federally issued licenses, the Second Circuit has effectively determined that every federal agency can now achieve arbitrarily by its own regulation what Congress has specifically prohibited by statute. A regulatory agency's unfettered right to interpret not only its own rules, but also bankruptcy law retroactively and, thus, to terminate a licensee's rights to property, denies virtually any regulated companies the right to reorganize at all. Nothing in the FCA overrides these fundamental principles of the Bankruptcy Code. In a very recent decision, the Court of Appeals for the Fifth Circuit upheld confirmation of a chapter 11 plan based on the ownership of identical licenses and identified them as

property of the debtors' bankruptcy estates thereby affording their holders the Bankruptcy Code's fundamental protections. See F.C.C. v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.), 2000 WL 1528690 (5th Cir. October 20, 2000).

Ultimately, the Second Circuit has upset and dismantled the balance of the rights and obligations of debtors and creditors creating a manifest and palpable injustice. Neither the Bankruptcy Code nor the FCA should be interpreted to permit the FCC to cancel more than $4.7 billion of Licenses for the sake of a single post-bankruptcy interest payment that the Bankruptcy Code allows NextWave to cure. Thus, NextWave's petition for certiorari should be granted.

III. ARGUMENT

A. The Second Circuit's Decision Effectively Seizes Congress's Exclusive Power to Legislate.

The power to establish uniform laws regarding bankruptcy resides, not with the FCC, but exclusively with Congress. See U.S. Const. art. I, § 8, cl. 4. The singular importance of the Constitutional separation of powers, establishing Congress's exclusive power to enact legislation, is fundamental to our jurisprudence:

> When the legislative and executive powers are united in the same person or body, . . . there can be no liberty . . . . No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty . . . . [W]here the whole power of one department is exercised by the same hands which possess the whole power of

> another department, the fundamental principles of a free constitution are subverted.

James Madison, The Federalist No. 47, pp. 303, 324, 325-26 (J. Cooke ed. 1961). Similarly, Justice Douglas many years later wrote:

> In some nations [legislative] power is entrusted to the executive branch as a matter of course . . . . We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 630 (1952) (Douglas, J., concurring) (emphasis in original).

Under the Second Circuit's decision, the FCC, an agency of the executive branch, may per se legislate an exception to the Bankruptcy Code that simply has not been enacted by Congress. Accordingly, the FCC's conduct in these cases contravenes the specific Constitutional grant of power and the basic principle of separation of powers. See generally Freeman v. City of Mobile, 193 F.3d 1179 (11th Cir. 1999) (agency cannot supplant an act of the legislature).

The Bankruptcy Code provides that the debtor and its property are entitled to the benefit of a broad

automatic stay of any effort to collect prepetition debts or to seize the debtor's property once bankruptcy protection is sought. 11 U.S.C. § 362(a). The automatic stay, which is at the heart of the Bankruptcy Code, has certain specific and limited exceptions enacted by Congress to further certain competing public policy concerns. See 11 U.S.C. § 362(b). By depriving the Bankruptcy Court of the ability to enforce the provisions of the Bankruptcy Code, the Second Circuit granted the FCC the unfettered ability to terminate retroactively the Licenses solely in response to nonpayment of prebankruptcy amounts due despite the pending bankruptcy stay.

Congress refused to include in either the Telecommunications Act of 1993, or any other legislation, an exception to the automatic stay that would have entitled the FCC unilaterally to terminate the Licenses.[2] The FCC simply cannot point to any law that would permit it to terminate the Licenses if bankruptcy law was properly applied in the instant case. If bankruptcy law were applied correctly, the FCC's own regulations would be unenforceable in this context.

Courts have stated time and again that the Constitution does not permit an executive agency, either

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[2] In its report to Congress on spectrum auctions, dated October 9, 1997, the FCC asked Congress "to adopt legislation that would clarify that provisions of the bankruptcy code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses." FCC Rep. No. 97-353, WT Docket No. 97-150, 1997 WL 629251 (Oct. 9, 1997). The requested legislation was not adopted.

by enacting a regulation or interpreting its own regulations, to circumvent the intent of Congress. See Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) ("[A] rule out of harmony with the statute, is a mere nullity."); Bukala v. United States, 854 F.2d 201, 203 (7th Cir. 1988) ("[A]n agency's interpretation of a statute, as evidenced by its lawfully promulgated rules and regulations, cannot supersede statutory language . . . ."); United States v. Gordon, 638 F.2d 886, 888 (5th Cir.) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute . . . ."), cert. denied, 452 U.S. 909 (1981); Furlow v. United States, 55 F. Supp. 2d 360, 364 (D. Md. 1999) ("It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations.").

As NextWave points out in its petition, the Second Circuit's finding that the Bankruptcy Court lacked jurisdiction to make a determination with respect to the Licenses ignores specific grants of jurisdiction pursuant to federal statute as well as case law of this Court and others. Indeed, the Fifth Circuit recently found that the FCC could not avoid application of federal bankruptcy law with respect to wireless PCS licenses similar to NextWave's stating, "[t]he bankruptcy court's enjoining the FCC from revoking the licenses and avoiding the majority of the obligations under the notes was within its jurisdiction to preserve property of the estate." GWI, 2000 WL 1528690 at *15 n. 29.

Furthermore, the Second Circuit improperly elevated the FCC's after-the-fact interpretation of its own regulations over statutory authority. As the Fifth Circuit noted, the FCC's view of the law is not entitled to such deference, "in circumstances such as these, where an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation

position for the agency, we have declined to defer to the interpretation." GWI, 2000 WL 1528690 at *10. Where, as here, the FCC's interpretation came after the litigation in the bankruptcy proceeding commenced, no special deference should be accorded. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); see also Chrysler Corp. v. Brown, 441 U.S. 281, 317 (1979) ("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position and the nature of its expertise."). The FCC cannot be allowed to change the law retroactively based upon its own after-the-fact interpretation. This Court should grant NextWave's petition.

B. The Automatic Stay Prevents the FCC from Attempting to Cancel or Terminate the Licenses.

Section 362(a), the automatic stay provision of the Bankruptcy Code, protects the property of the debtor, as well as the debtor itself, from creditor collection efforts during the pendency of the debtor's bankruptcy case as well as providing the debtor a "fresh start".

> To determine if conduct is subject to the automatic stay, three factors must be considered: (1) whether one of section 362(a)'s subsections describes the conduct in question; (2) whether the conduct affects the debtor, property of the debtor or property of the estate;[3] and (3) whether the

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[3] Notwithstanding the Second Circuit's failure to address this issue, it is undeniable that the Licenses are property of the debtors' estates under section 541 of the (continued...)

conduct relates to a pre-petition or post-petition claim.

1 Chapter 11 Theory and Practice, § 8.01 (Queenan, Hendel, Hillinger, eds. 1998). By deciding that the

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[3] (...continued)
Bankruptcy Code. The great weight of authority establishes that a license that has been granted to a debtor by a governmental agency constitutes property of the debtor's estate. See, e.g., Ramsay v. Dowden (In re Central Ark. Broad. Co.), 68 F.3d 213, 214 (8th Cir. 1995) (radio station operating license granted by the FCC); In re Neiberger, 934 F.2d 1300, 1302-03 (3d Cir. 1991) (holding that the mere possibility of renewal of a state liquor license that had expired pre-petition constituted property of a debtor's estate); State of California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.), 792 F.2d 1400, 1402 (9th Cir. 1986) (state liquor license); In re Kansas Personal Communications Servs., Ltd., 252 B.R. 179, 194 (Bankr. D. Kan. 2000) (holding that FCC C-block licenses are property of estate). Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 869-71 (Bankr. S.D.N.Y. 1990) (holding that FCC license constitutes property of a debtor's estate), aff'd, 124 B.R. 421 (S.D.N.Y. 1991). Ultimately, "[a] broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury." L.B. Wilson, Inc. v. F.C.C., 170 F.2d 793, 798 (D.C. Cir. 1948); see also Jefferson-Pilot Corp. v. Commissioner, 98 T.C. 435, 445 (1992) (holding that "[t]he economic reality is that an FCC license represents a valuable asset to its holder . . . . [A]n FCC license represents the valuable right of entry into the broadcasting market for a particular area. FCC licenses are, subject to approval by the FCC, bought and sold."), aff'd, 995 F.2d 530 (4th Cir. 1993) (citations omitted).

Consequently, the bankruptcy court has jurisdiction over such property pursuant to 28 U.S.C. § 1334(b) and (e).

Bankruptcy Court is without jurisdiction to decide the issues relating to the Licenses, the Second Circuit has allowed the FCC to cloak in regulatory garb its efforts to repossess NextWave's property, to the detriment of all other creditors, solely to satisfy its claims.

The statutory protection afforded by section 362(a) is axiomatic. The legislative history of section 362(a) speaks unambiguously:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49-51 (1978).

Other courts of appeals have given great deference to the stay and accorded it unmatched importance. As the Court of Appeals for the First Circuit stated:

> "[T]he dead tree gives no shelter." T.S. Eliot, The Waste Land, I, The Burial of the Dead (1922). Like a shade tree, the automatic stay which attends the initiation of bankruptcy proceedings, 11 U.S.C. § 362(a) (1994), must be nurtured if it is to retain its vitality.

Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 971 (1st Cir. 1997).[4]

Indeed, notwithstanding its summary dismissal of the Bankruptcy Court's jurisdiction in the instant cases, the Second Circuit had explicitly recognized the importance of the automatic stay in the face of a similar attempt post-bankruptcy by a governmental agency to encumber assets of a debtor on account of pre-bankruptcy claims. See Lincoln Sav. Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Assoc., Inc.), 880 F.2d 1540, 1545 (2d Cir. 1989), cert. denied, 493 U.S. 1058 (1990). In that case, the Second Circuit rejected Suffolk County's argument that, because a tax lien on the debtor's property arose post-petition "by operation of law" and without an affirmative act, the perfection of the lien did not violate the automatic stay, commenting:

> The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment by ensuring that no creditor receives more than an equitable share of the bankrupt's

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[4] In fact, in Soares, the Court of Appeals specifically noted that "retroactive relief from the automatic stay must rest on facts that are unusual and unusually compelling." Id. at 977. Ultimately, the Court of Appeals found that retroactive relief from the stay would only be warranted where the creditor could demonstrate that (i) it had no knowledge of the pending bankruptcy case when the creditor took action to pursue its claim or (ii) the debtor acted in bad faith. Id. at 978. The FCC has never offered any such allegations or evidence of bad faith in the instant cases that could have mandated or justified the retroactive relief it sought.

> estate. This equitable treatment requires that all creditors, both public and private, be subject to the automatic stay.

Id. (emphasis added) (citations omitted).

Ironically, the very argument rejected by the Second Circuit in Parr Meadows is the same argument the Second Circuit has now upheld here under the guise of regulatory action. That is, the government can take any steps it deems necessary in the face of the automatic stay to collect pecuniary obligations owing to it if that governmental entity can manufacture a purported regulatory objective for its debt collection action.

Ultimately, the essential purpose of the automatic stay under section 362(a) is to preserve the utility of other provisions of the Bankruptcy Code: in chapter 11 these provisions are designed fundamentally to facilitate a debtor's reorganization. See United States v. Energy Resources Co., 495 U.S. 545, 551 (1990) (holding when necessary for reorganization, Bankruptcy Code trumps conflicting sections of Internal Revenue Code). Among these essential provisions is the debtor's right to cure defaults under sections 1123(a)(5)(G) and 1124(2)(A) as part of the plan confirmation process. See Florida Partners Corp. v. Southeast Co. (In re Southeast Co.), 868 F.2d 335, 337-38 (9th Cir. 1989); Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber Supply, Inc.), 850 F.2d 1338, 1342 (9th Cir. 1988) (stating that "[i]t is clear that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default"). As the Second Circuit succinctly stated in DePierro v. Taddeo (In re Taddeo), 685 F.2d 24, 27 (2d Cir. 1982), "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified." Therefore, assuming

that NextWave, in fact, defaulted on payment obligations during the pendency of the bankruptcy cases due to their reliance on section 362(a)'s automatic stay and the FCC's affirmative statements in the record regarding its applicability, NextWave has the right (and indeed has proposed in its chapter 11 plan) to cure any such default and reinstate the indebtedness pursuant to a chapter 11 plan of reorganization.

The FCC's determination, in its sole discretion, that NextWave's failure to pay the obligations timely terminated the Licenses by "operation of law" directly contravenes fundamental bankruptcy law. Commencing on the filing for bankruptcy relief, a debtor cannot generally make payments of the kind sought by the FCC absent confirmation of a chapter 11 plan of reorganization. See Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987); see also In re Revere Copper & Brass, Inc., 32 B.R. 577, 582 (Bankr. S.D.N.Y. 1983) ("[p]re-petition creditors may be paid or recover on their claims in a Chapter 11 case only by means of a distribution under a confirmed plan of reorganization"). To avoid such a result, this Court should grant NextWave's petition and reverse the Second Circuit's decision.

C. The FCC's Cancellation of the Licenses Does Not Fall Within Section 362(b)(4)'s Governmental Exception.

When Congress enacted the Bankruptcy Code in 1978, it created special exceptions to the automatic stay to permit certain parties to take certain actions in specified situations. Those exceptions are clear and narrowly defined. See 11 U.S.C. § 362(b). Since 1978, Congress has added several more exceptions that it deemed were necessary in order to effectuate other laws, such as chemical weapons legislation. See 11 U.S.C.

§ 362(b)(4).[5] Similarly, the Secretaries of the Departments of Transportation, Education and Housing and Urban Development each have specially carved exceptions to the automatic stay to promote particularly important governmental interests. See 11 U.S.C. § 362(b)(8), (12) and (16). Notwithstanding the FCC's repeated emphasis on the importance of its policies and regulations, Congress has never granted the FCC any such exception.

Congress enacted the section 362(b)(4) exception for "police and regulatory power" to enforce laws affecting health, welfare, morals and safety; however, neither its text nor legislative history suggests that it should encompass "regulatory laws" that "directly conflict with the administration of the res or property by the bankruptcy court." In re State of Missouri, 647 F.2d 768, 776 (8th Cir. 1981) (holding that although laws regarding operation and liquidation of grain warehouses were regulatory in nature, they primarily related to the protection of a pecuniary interest, and as such, did not fall within the section 362(b)(4) exception), cert. denied, 454 U.S. 1162 (1982). The legislative history accompanying this provision makes this clear:

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to

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[5] Following the 1998 amendment to section 362(b)(4), reliance on its plain meaning would preclude its application to the FCC's actions with respect to the Licenses and confine its application to enforcement of chemical weapons non-proliferation legislation. See, e.g., Finley v. Miss. Dep't of Public Safety (In re Finley), 237 B.R. 890, 894-95 (Bankr. N.D. Miss. 1999) limiting application section 362(b)(4) to chemical weapons legislation).

> protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards) (emphasis added); 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) (emphasis added). Representative Gilman took a similarly restrictive view of section 362(b)(4) nearly twenty years later when discussing an amendment to section 362(b)(4):

> [W]e view it as important for the legislative history to emphasize that the new [section 362(b)(4)] relates only to the enforcement of police and regulatory power - a term which cannot appropriately be given an expansive construction for purposes of interpreting the new Bankruptcy Code language.

143 Cong. Rec. H10950-03, H10951 (daily ed. Nov. 12, 1997) (statement of Representative Gilman referring to the amendment of section 362(b)(4) adopted to accommodate chemical weapons legislation); 144 Cong. Rec. H4283-01, H4286 (daily ed. June 9, 1988) (same).[6]

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[6] Even Congressional critics of the scope of the Bankruptcy Code have recognized the limitation of this exception to the promotion or preservation of public health and safety. See 143 Cong. Rec. S9406-01 (daily ed. Sept. 16, 1997) (statement of Senator Grassley) (criticizing breadth of automatic stay, but acknowledging that only public health and safety prevail in the section 362(b)(4) exception).

The litany of case-law that has developed regarding the section 362(b)(4) exception to the automatic stay does not lead to a different conclusion. For example, this Court has held that a governmental agency is not free to enforce an assessment of pre-bankruptcy environmental clean-up reimbursement costs because doing so conflicts with the Bankruptcy Code's carefully crafted scheme for the disposition of a debtor's property. See Ohio v. Kovacs, 469 U.S. 274, 283 n.11 (1985).[7] Similarly, one bankruptcy court has refused to apply this exception to FCC licenses similar to those held by NextWave. See In re Kansas Personal Communications Servs., Ltd, 252 B.R 179, 194 (Bankr. D. Kan. 2000) (holding that the FCC is stayed from canceling a license without first obtaining relief from the stay because public health and safety concerns were not implicated).

Furthermore, this Court has held that an administrative agency which may otherwise be entitled to commence proceedings under section 362(b)(4) of the Bankruptcy Code may not exercise any rights against property of the estate unless it obtains relief from the automatic stay in the Bankruptcy Court. See Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc. (In re MCorp Fin., Inc.), 502 U.S. 32, 41 (1991).

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[7] See also, Brock v. Morysville Body Works, Inc., 829 F.2d 383, 388-89 (3d Cir. 1987) (enforcement of Secretary of Labor's order to abate violations of OSHA standards held not barred by automatic stay); Commonwealth Oil Refining Co., Inc. v. United States Environmental Protection Agency (In re Commonwealth Oil Refining Co., Inc.), 805 F.2d 1175, 1183 (5th Cir. 1986) (automatic stay held not to apply to EPA's action to bring debtor into compliance with federal and state environmental laws), cert. denied, 483 U.S. 1005 (1987).

In light of the clear legislative history concerning section 362(b)(4) and the case-law interpreting it, it should be properly concluded that the "police and regulatory power" exception plainly does not permit the FCC to cancel NextWave's Licenses retroactively solely because NextWave did not make its single interest payment prior to confirmation of its chapter 11 plan. the purported termination of the Licenses served a pecuniary rather than a regulatory purpose. It is evidently clear, that when bankruptcy law is properly applied to the facts of the instant case, the FCC cannot credibly contend that its action falls within the section 362(b)(4) exception.

IV. CONCLUSION

For all of the foregoing reasons, the undersigned respectfully requests that this Court grant NextWave's petition for certiorari and grant such other and further relief as may be just and proper.

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